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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

ALEXANDER B. KASDAN,	}	CASE NO. CV12-6793-GAF (JEMx)
Plaintiff,		Assigned to Hon. Gary A. Feess
vs.		
COUNTY OF LOS ANGELES, <i>et al.</i> ,	}	NOTICE OF MOTION AND
Defendants.		MOTION TO DISMISS ORIGINAL
		COMPLAINT BY DEFENDANT
		LOU NIEMAN
	}	DATE: December 3, 2012
		TIME: 9:30 A.M.
		PLACE: Courtroom 740

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 3, 2012 at 9:30 a.m., or as soon thereafter as the matter may be heard in the above-entitled Court, Defendant Lou Nieman (erroneously named as Lou Graham) will bring for hearing before the Honorable Gary A. Feess, United States District Judge, in Courtroom No. 740 of the Edward R. Roybal Federal Building and United States Courthouse, located at 255 East

Locke Lord LLP
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1 Temple Street, Los Angeles, California 90012-3332, a Motion to Dismiss the Original
 2 Complaint of Plaintiff Alexander B. Kasdan ("Plaintiff") pursuant to Rules 12(b)(1)
 3 and 12 (b)(6) of the Federal Rules of Civil Procedure.

4 Defendant moves to dismiss the Complaint pursuant to Rule 12(b)(1) on the
 5 ground that the Court lacks subject-matter jurisdiction under the doctrines of *Burrus*
 6 abstention, *Younger* abstention, and/or *Rooker-Feldman*.

7 Defendant also moves to dismiss the Complaint pursuant to Rule 12(b)(6) on
 8 the ground that Plaintiff fails to state a claim upon which relief may be granted.

9 Defendant requests that the dismissal be made with prejudice and without leave
 10 to amend.

11 This Motion is based on this Notice of Motion and Motion, the Memorandum
 12 of Points and Authorities, the pleadings, papers and records on file in this case, and
 13 such oral argument as may be presented at the hearing.

14 This Motion is made following the conference of counsel pursuant to L.R. 7-3,
 15 which took place on October 8, 2012.

16 Dated: October 12, 2012

Respectfully submitted,

LOCKE LORD LLP

19 By: /s/ Karen R. Palmersheim
 20 Karen R. Palmersheim
 21 Silvia Huang
 22 Attorney for Defendant
 23 Lou Nieman (erroneously sued as Lou
 24 Graham)
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TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION	9
II. RELEVANT ALLEGATIONS	10
III. ARGUMENT AND AUTHORITIES	12
A. This Court Lacks Subject-Matter Jurisdiction Which Requires Dismissal of the Entire Complaint.	12
1. This Court Should Abstain From This Matter Under the <i>Burrus</i> Abstention Doctrine.....	12
2. Either <i>Younger</i> Abstention Or <i>Rooker-Feldman</i> Applies, Which Precludes Subject Matter Jurisdiction.....	14
a. The <i>Younger</i> Abstention Doctrine Applies If The State Case Is Ongoing.	14
b. The <i>Rooker-Feldman</i> Doctrine Applies If The State Case Has Concluded.....	16
B. Plaintiff Fails To State A Claim Against Nieman.	18
1. Plaintiff Fails To Allege Any Facts Relating to Nieman.	18
2. Plaintiff Cannot Allege A § 1983 Claim Against Nieman.	19
3. Plaintiff Fails To State An IIED or NIED Claim Against Nieman.	22
a. Plaintiff’s Third Count for Intentional Infliction of Emotional Distress and Fourth Count for Negligent	

1 Infliction of Emotional Distress Fail Because They
2 Lack Facts to State a Claim. 22

3
4 b. Plaintiff's Negligent Infliction of Emotional Distress
5 Claim Also Fails Because Plaintiff Has Not Pled Any
6 Breach of Duty by Nieman..... 23

7 4. Plaintiff's Fifth Count for Violation of Civil Rights Does
8 Not State a Plausible Claim Against Nieman. 24
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Am. Mfrs. Mut. Ins. Co. v. Sullivan</i>	
526 U.S. 40 (1999).....	19
<i>Ashcroft v. Iqbal</i>	
556 U.S. 662 (2009).....	18, 19
<i>Atwood v. Ft. Peck Tribal Court</i>	
513 F.3d 943 (9th Cir. 2008)	13
<i>Bell Atl. Corp. v. Twombly</i>	
550 U.S. 544 (2007).....	18, 19
<i>Buechold v. Ortiz</i>	
401 F.2d 371 (9th Cir. 1968)	12
<i>Burns v. County of King</i>	
883 F.2d 819 (9th Cir. 1989)	21
<i>In re Burrus</i>	
136 U.S. 586 (1890).....	9, 12
<i>Carmona v. Carmona</i>	
603 F.3d 1041 (9th Cir. 2010)	16
<i>Danforth v. Celebrezze</i>	
76 Fed. Appx. 615 (6th Cir. 2002)	13
<i>Degrassi v. City of Glendora,</i>	
207 F.3d 636 (9th Cir. 2000)	20
<i>Dist. of Columbia Court of Appeals v. Feldman</i>	
460 U.S. 462 (1983).....	9, 14, 16, 17
<i>Doe v. Mann</i>	
415 F.3d 1038 (9th Cir. 2005)	6
<i>E.T. v. George</i>	
681 F.Supp.2d 1151 (E.D. Cal. 2010)	15, 23

1	<i>Exxon Mobil Corp. v. Saudi Basic Indus. Corp.</i>	
2	544 U.S. 280 (2005).....	6
3	<i>Florer v. Congregation Pidyon Shevuyim, N.A.</i>	
4	639 F.3d 916 (9th Cir. 2011)	19
5	<i>Gibson v. Berryhill</i>	
6	411 U.S. 564 (1973).....	14
7	<i>Gordon v. Koppel</i>	
8	203 F.3d 610 (9th Cir. 2000)	14, 15
9	<i>Grimes v. Alameda Co. Social Servs.</i>	
10	2011 WL 4948879 (N.D. Cal. Oct. 18, 2011)	17
11	<i>Jacoves v. United Merch. Corp.</i>	
12	9 Cal. App. 4th 88 (1992)	23
13	<i>Juidice v. Vail</i>	
14	430 U.S. 237 (1977).....	15
15	<i>Jones v. Community Redevelopment Agency</i>	
16	733 F.2d 646 (9th Cir. 1984)	21
17	<i>Kokkonen v. Guardian Life Ins. Co.</i>	
18	511 U.S. 375 (1994).....	12
19	<i>Lawson v. Mgmt. Activities</i>	
20	69 Cal.App.4th 652 (1999)	23
21	<i>Leer v. Murphy,</i>	
22	844 F.2d 628 (9th Cir. 1988)	20
23	<i>Leubner v. County of San Joaquin</i>	
24	2012 WL 2995671 (E.D. Cal. July 23, 2012).....	17
25	<i>McGhan v. Kalkaska Co. Dept. of Human Servs.</i>	
26	2009 WL 2170151 (W.D. Mich. July 20, 2009)	13
27	<i>Middlesex Co. Ethics Comm. v. Garden State Bar Ass'n</i>	
28	457 U.S. 423 (1982).....	14, 15
	<i>Moore v. Sims</i>	
	442 U.S. 415 (1979).....	15

1	<i>Noel v. Hall</i>	
2	341 F.3d 1148 (9th Cir. 2003)	16
3	<i>Operhall v. Az. Dep't of Econ. Sec.</i>	
4	324 Fed. Appx. 617 (9th Cir. 2009)	7
5	<i>Pena v. Gardner</i>	
6	976 F.2d 469 (9th Cir. 1992)	21
7	<i>Pennzoil v. Texaco</i>	
8	481 U.S. 1 (1987).....	14, 15
9	<i>Potter v. Firestone Tire & Rubber Co.</i>	
10	6 Cal. 4th 965 (1993)	22, 23
11	<i>Price v. State of Hawaii</i>	
12	939 F.2d 702 (9th Cir. 1991)	21
13	<i>Reusser v. Wachovia Bank, N.A.</i>	
14	525 F.3d 855 (9th Cir. 2008)	16
15	<i>Rooker v. Fidelity Trust Co.</i>	
16	263 U.S. 413 (1923).....	9, 14, 16, 17
17	<i>Sample v. Monterey Co. Family & Children Servs.</i>	
18	2009 WL 2485748 (N.D. Cal. Aug. 7, 2009).....	17
19	<i>Sareen v. Sareen</i>	
20	356 Fed. Appx. 977 (9th Cir. 2009)	17
21	<i>Saunders v. Obama</i>	
22	2012 WL 1030473 (S.D. Ohio Mar. 27, 2012)	13
23	<i>Schwartz v. Lassen Cnty</i>	
24	838 F.Supp.2d 1045 (E.D. Cal. 2012)	23
25	<i>Simmons v. Sacramento Cnty. Superior Court</i>	
26	318 F.3d 1156 (9th Cir. 2003)	20
27	<i>Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.</i>	
28	49 Cal.App.4th 472 (1996)	22
	<i>Sosna v. Iowa</i>	
	419 U.S. 393 (1975).....	15

1	<i>Starr v. Baca</i>	
2	652 F.3d 1202 (9th Cir. 2011)	18
3	<i>Sykes v. State of Cal.</i>	
4	497 F.2d 197 (9th Cir. 1974)	21
5	<i>Taylor v. List</i>	
6	880 F.2d 1040 (9th Cir. 1989)	20
7	<i>United States v. Morros</i>	
8	268 F.3d 695 (9th Cir. 2001)	14
9	<i>Younger v. Harris,</i>	
10	407 U.S. 37 (1971).....	9, 14, 15
11	STATUTES	
12	28 U.S.C. § 1343.....	13
13	28 U.S.C. § 1367.....	13
14	28 U.S.C. § 1367(c)	13
15	42 U.S.C. § 1983.....	11, 14, 17, 18, 19, 20, 21
16	California Civil Code § 43	24
17	California Civil Code § 49.....	24
18	California Civil Code § 51	24
19	California Civil Code § 51(b)	24
20	California Civil Code § 52.....	24
21	California Civil Code § 52.1	24
22	California Government Code § 820.21	23
23	California Welf. & Inst. Code § 827	14
24	Federal Rule of Civil Procedure Rule 8(a)(2).....	17
25	Federal Rule of Civil Procedure Rule 12(b)(1)	12
26	Federal Rule of Civil Procedure Rule 12(b)(6)	18
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1 Federal Rule of Civil Procedure Rule 12(h)(3) 12

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

More than two years ago, Plaintiff's four minor children were removed from his custody amidst allegations of domestic violence and/or abuse. Plaintiff's fifty-one page Complaint chronicles Plaintiff's perception of the events leading up to the children's removal and continues through the subsequent juvenile dependency proceedings that were and are apparently still being conducted in a California family courts. To be overly concise, according to Plaintiff, there is some well-orchestrated, multi-party conspiracy to unlawfully deprive him of his children.

This Motion to Dismiss is brought by one of the fifty-six (56) named defendants: Defendant Lou Nieman (erroneously named as Lou Graham; "Nieman"). Nieman worked for Children's Bureau of Southern California ("Children's Bureau"), a nonprofit foster family agency. Ms. Nieman was and is Children's Bureau's Director of Foster Care. Nieman is named only once in the allegations of the Complaint, at Paragraph 59, which merely identifies Nieman as a defendant. Subsequently, Plaintiff occasionally uses defined and undefined terms like "Private Defendants" or "Social Services Defendants" but it is unclear which defendants fall into that group, and there is no identifiable or individual act or omission alleged as to Nieman. What she allegedly did to get herself sued is not revealed in Plaintiff's extensive Complaint.

Nieman moves the Court dismiss the Complaint on the ground that this Court lacks subject-matter jurisdiction. Subject matter jurisdiction is lacking under the *Burrus* abstention doctrine, which prudentially commits family law matters to the state courts. Similarly, depending on the status of the state court dependency proceeding, either abstention under *Younger* (if the state case is continuing which defendant is informed and believes) or application of *Rooker-Feldman* (if the state case has concluded) precludes this Court from exercising subject-matter jurisdiction.

Nieman also moves for dismissal because Plaintiff fails to state a claim against her that is plausible and upon which relief can be granted. For the various reasons

1 explained below, Plaintiff fails to state viable constitutional and/or tort claims,
 2 especially considering Plaintiff's complete failure to attribute any particular act to
 3 Nieman. Hence, for these reasons and those explained more fully below, Nieman's
 4 Motion to Dismiss should be granted and the claims against Nieman in Plaintiff's
 5 Original Complaint should be dismissed.

6 **II. RELEVANT ALLEGATIONS¹**

7 Plaintiff had four minor children with his wife, Tania Kasdan ("Tania").²
 8 (Compl. ¶ 82.)

9 On December 31, 2009, Plaintiff had a domestic dispute with Tania while some
 10 or all of the children were present. (Compl. ¶ 83.) The police responded, Plaintiff
 11 was instructed to leave the Kasdan residence for the night, and a state social worker
 12 interviewed Tania and/or the children regarding the dispute. (Compl. ¶¶ 83-85.)

13 The next day, January 1, 2010, the police and social worker returned to the
 14 Kasdan residence, served Plaintiff with restraining order to stay away from the
 15 children, and instructed Plaintiff not to come back to the residence until after a
 16 preliminary hearing in dependency court. (Compl. ¶¶ 87-89.) Plaintiff disputes
 17 whether this was permissible. (*Id.*)

18 A juvenile dependency petition was filed against Plaintiff alleging, among other
 19 things, that Plaintiff physically abused one or more of the children and that there was a
 20 family "history of domestic violence." (Compl. ¶ 90.) Plaintiff appeared at a January
 21 6, 2010 preliminary hearing on the petition, and denied the allegations. (*Id.*)

22 Sometime in January 2010, between various state court hearings, the children
 23 were removed from their parents' custody, including Plaintiff's, and detained by social
 24 service officials. (Compl. ¶ 93.)

25
 26 ¹ These allegations are derived from Plaintiff's Complaint and are accepted as true for the purposes of
 27 this motion only. Nieman expressly reserves the right to contest Plaintiff's version of the facts should this
 matter proceed past the pleading stage, which it should not.

28 ² The status of the Kasdans' marriage is unknown. Tania Kasdan is also a named defendant to this
 lawsuit.

1 The state court dependency proceeding ran its course. Throughout, Plaintiff
2 continued to dispute the allegations made against him in various petitions, reports,
3 and/or testimony, and alleges that those allegations were false, fabricated, and/or
4 misleading. (Compl. ¶¶ 92-102.) But in October 2010, a trial over several days
5 resulted in the state court sustaining findings against Plaintiff of physical and/or
6 emotional domestic violence or abuse that presented a continuing risk to the children.
7 (Compl. ¶ 103.) Plaintiff denies these findings and the underlying evidence presented
8 to sustain them. (*Id.*)

9 From October 2010 to approximately April 2011, Plaintiff was permitted
10 supervised visitation with the children. (Compl. ¶¶ 111-117.) But in April 2011, the
11 state dependency court entered an emergency order ceasing Plaintiff's visitation rights
12 allegedly on the basis that Plaintiff's visits upset the children. (Compl. ¶ 117.)
13 Plaintiff contends that his visitation did not upset the children and that, as a result of
14 the emergency order, he has not seen the children since April 2011. (*Id.*) Plaintiff
15 filed the present lawsuit in this Court over a year later on August 7, 2012.

16 The Complaint contains no allegations directly against Nieman—other than to
17 identify her as a party in her individual capacity as a result of her position with
18 Children's Bureau. (Compl. ¶¶ 59.) Children's Bureau is a California non-profit foster
19 family agency that contracts with the Los Angeles County Department of Children
20 and Family Services for outplacement foster care. (Compl. ¶¶ 58,59.)

21 It is unclear what claims Plaintiff actually intends to assert against Nieman. It
22 appears from Defendant's reading of the Complaint that the only count asserted
23 against Nieman is the first count for violation of constitutional rights under 42 U.S.C.
24 § 1983. Nieman does not appear to fall into the "social service defendant" category,
25 since she was employed by a private foster family agency and was not a social worker
26 with the Department of Children and Family Services. However, in the abundance of
27 caution, Nieman also challenges the counts for intentional and/or negligent infliction
28

1 of emotional distress; and violations of state civil rights, in case those were intended
 2 to be asserted against Nieman.³

3 **III. ARGUMENT AND AUTHORITIES**

4 **A. This Court Lacks Subject-Matter Jurisdiction Which Requires** 5 **Dismissal of the Entire Complaint.**

6 A Rule 12(b)(1) motion challenges the Court's subject-matter jurisdiction.
 7 Federal courts are of limited jurisdiction, presume a lack of jurisdiction, and place the
 8 burden to establish subject-matter jurisdiction on the invoking party. *Kokkonen v.*
 9 *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "If the Court determines at any
 10 time that it lacks subject-matter jurisdiction, the court must dismiss the action." FED.
 11 R. Civ. P. 12(h)(3).

12 **1. This Court Should Abstain From This Matter Under the** 13 ***Burrus* Abstention Doctrine.**

14 More than a century ago, the United State Supreme Court recognized that "[t]he
 15 whole subject of the domestic relations of husband and wife, parent and child, belongs
 16 to the laws of the states and not to the laws of the United States." *In re Burrus*, 136
 17 U.S. 586, 593-94, 10 S. Ct. 850, 853 (1890); *see also Buechold v. Ortiz*, 401 F.2d 371,
 18 372 (9th Cir. 1968) ("federal courts must decline jurisdiction of cases concerning
 19 domestic relations when the primary issue concerns the status of parent and child or
 20 husband and wife.").

21 Now, under what is called the *Burrus* abstention doctrine,⁴ "federal courts have
 22 universally declined to exercise jurisdiction in domestic relations cases in which a
 23 complaint contains only conclusory assertions that a plaintiff is entitled to relief
 24

25 _____
 26 ³ Plaintiff's other counts for (1) *Monell*-related claims (Compl. ¶¶ 129-133); (2) injunctive relief
 27 (Compl. ¶¶ 157-162); and (3) violations of the Americans With Disabilities Act (Compl. ¶¶ 163-170) limit
 themselves to other defendants, namely the County of Los Angeles and/or the Los Angeles County
 Department of Children and Family Services.

28 ⁴ The *Burrus* abstention doctrine is also known as the domestic relations exception to federal
 jurisdiction.

1 because of the state's constitutional violations, where those assertions are 'a mere
 2 pretense and the suit is actually concerned with domestic relations issues.'" *Saunders*
 3 *v. Obama*, No. 1:10-CV-836, 2012 WL 1030473, at * 5 (S.D. Ohio Mar. 27, 2012)
 4 (quoting *Danforth v. Celebrezze*, 76 Fed. Appx. 615, 616 (6th Cir. 2002)); *McGhan v.*
 5 *Kalkaska Co. Dept. of Human Servs.*, No. 1:08-CV-1113, 2009 WL 2170151, at *9
 6 (W.D. Mich. July 20, 2009) (applying *Burrus* abstention; "the court lacks jurisdiction
 7 over any claim by plaintiff that she suffered injuries resulting from the decisions made
 8 by Michigan's courts in child custody proceedings.").

9 Here, Plaintiff's Complaint falls squarely within the *Burrus* abstention
 10 principles. The entirety of the underlying factual matters relate to and arise out of
 11 juvenile dependency proceedings relating to the parent-child relationship between
 12 Plaintiff and his children. Plaintiff's ultimate contention (necessary to each and every
 13 of his claims) is that the state family court got it wrong; otherwise, Plaintiff was
 14 rightfully, not wrongfully, deprived of his children. The broad injunctive relief
 15 requested by Plaintiff effectively seeks to pit this Court against the state court on the
 16 issue of the propriety of maintaining Plaintiff's parent-child relationship—a subject
 17 that has historically been committed to the state. The *Burrus* abstention doctrine
 18 prudently permits this Court to abstain from entering into the state court-reserved fray
 19 of child custody, child welfare, and domestic relations. Accordingly, the Court should
 20 dismiss the case for lack of subject-matter jurisdiction on the basis of *Burrus*
 21 abstention.⁵

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⁵ In *Atwood v. Ft. Peck Tribal Court*, 513 F.3d 943 (9th Cir. 2008), the Ninth Circuit held *Burrus* abstention was inapplicable to claims relying on federal-question jurisdiction. Plaintiff cites 28 U.S.C. § 1343 and § 1367 for his jurisdictional basis. Defendant submits that the *Burrus* doctrine is applicable to Plaintiff's claims. Alternatively, Defendant submits that the policy reasons for the doctrine at least justify this Court declination to exercise its supplemental jurisdiction. See 28 U.S.C. § 1367(c).

**2. Either *Younger* Abstention Or *Rooker-Feldman* Applies,
Which Precludes Subject Matter Jurisdiction.**

Younger abstention⁶ and the *Rooker-Feldman* doctrine⁷ are complementary jurisdictional doctrines arising out of the principles of federalism and comity between federal and state courts. Which doctrine applies depends on the status of the state court dependency proceeding, whether it has concluded or whether it is ongoing.⁸ But regardless both doctrines would compel the same result by this Court: dismissal.

a. The *Younger* Abstention Doctrine Applies If The State Case Is Ongoing.

Defendant is informed and believes, from discussions with Plaintiff, that the juvenile case proceeding is still ongoing. If the state court dependency proceeding is ongoing, *Younger* abstention is applicable. *Pennzoil v. Texaco*, 481 U.S. 1, 10 (1987) (requiring *Younger* abstention, instead of *Rooker-Feldman*, in § 1983 challenge to ongoing state proceeding). *Younger* abstention is proper where (1) there are ongoing state judicial proceedings; (2) that implicate important state interests; and (3) there is an adequate opportunity in the state proceedings to raise federal questions. *Middlesex Co. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The "policy objective behind *Younger* abstention is to avoid unnecessary conflict between state and federal governments." *United States v. Morros*, 268 F.3d 695, 707 (9th Cir. 2001). *Younger* abstention "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973); *Gordon v. Koppel*, 203 F.3d 610, 613 (9th Cir.

⁶ *Younger v. Harris*, 407 U.S. 37 (1971).

⁷ The doctrine takes its name from two complementary Supreme Court decisions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); and *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

⁸ On information and belief, Defendant believes that the state dependency proceeding is ongoing. Defendant, however, is not a participant in that proceeding, and the juvenile case file is confidential under California law. See CAL. WELF. & INST. CODE § 827.

2000) ("When the case is one in which the *Younger* doctrine applies, the case must be dismissed.").

Here, the requirements for *Younger* abstention are satisfied if the state court dependency proceeding is ongoing. First, the dependency proceeding would obviously be an ongoing state judicial proceeding. Second, the dependency proceeding no doubt implicates important state interests. "Family relations are a traditional area of state concern" *Koppel*, 203 F.3d at 613 (quoting *Moore v. Sims*, 442 U.S. 415, 435 (1979)); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing "domestic relations [as] an area that has long been regarded as a virtually exclusive province of the States"). Additionally, "a state has a vital interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory.'" *Id.* (quoting in part *Juidice v. Vail*, 430 U.S. 237, 336 n.12 (1977)).

Finally, the state court forum provides Plaintiff an adequate opportunity to present his federal concerns. "Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex*, 457 U.S. at 431. A federal court "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Penzoil Co.*, 481 U.S. at 15 (1987). Here, Plaintiff may—and quite likely has—presented his constitutional concerns to the state dependency court, and there is no indication that going forward Plaintiff would be deprived of a meaningful opportunity to raise new or ongoing federal concerns.

Each element of *Younger* abstention is present in this case. Indeed, in a similar parental custody dispute implicating federal constitutional concerns, the Ninth Circuit affirmed the district court's dismissal with the comment that "[t]his is precisely the type of case suited to *Younger* abstention." *Koppel*, 203 F.3d at 613; *see also E.T. v. George*, 681 F.Supp.2d 1151 (E.D. Cal. 2010) (well-reasoned, lengthy opinion dismissing putative constitutional class-action challenge to Sacramento County dependency courts on basis of *Younger* abstention doctrine).

b. The *Rooker-Feldman* Doctrine Applies If The State Case Has Concluded.

If the state court dependency proceeding has concluded, the *Rooker-Feldman* doctrine deprives this Court of subject-matter jurisdiction to hear this case. Under *Rooker-Feldman*, a federal district court lacks jurisdiction to hear "cases brought by state court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The doctrine "may also apply where the parties do not directly contest the merits of a state court decision, as the doctrine prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment." *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008). "A suit brought in federal district court is a 'de facto appeal' forbidden by *Rooker-Feldman* when 'a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision.'" *Carmona v. Carmona*, 603 F.3d 1041, 1050 (9th Cir. 2010) (quoting *Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003)).

Moreover, a federal district court "must also refuse to decide any issue raised in the suit that is 'inextricably intertwined' with an issue resolved by the state court in its judicial decision." *Doe v. Mann*, 415 F.3d 1038, 1043 (9th Cir. 2005); *Exxon*, 544 U.S. at 286 n.1 (stating that "a district court [cannot] entertain constitutional claims attacking a state court judgment, even if the state court had not passed directly on those claims, when the constitutional attack [is] 'inextricably intertwined' with the state court judgment").

The present dispute fits right in to the contours of the *Rooker-Feldman* doctrine. The entirety of Plaintiff's constitutional grievance is that (allegedly) time and time again the dependency court's orders were incorrect and/or corrupt, and that there was no basis to suspend his custody of the children. But Plaintiff had his day(s) in state

1 court, had occasion(s) to present his complaints, and had/has available the state
 2 appellate court system to review the dependency court's rulings for error—and as last
 3 resort, Plaintiff may be able to bring his constitutional arguments to the United States
 4 Supreme Court by *writ of certiorari*. But what is not permitted (and what *Rooker-*
 5 *Feldman* expressly prohibits) is Plaintiff's presentment of his grievances about the
 6 state court orders and effects to this Court as a *de facto* appeal. Similarly, all of
 7 Plaintiff's claims are inextricable intertwined with the state court proceeding because
 8 the factual basis for the claims are the various reports, filings, and testimony made
 9 during the course of that proceeding.

10 Accordingly, if the dependency proceeding has concluded, this Court lacks
 11 subject-matter jurisdiction over this case under *Rooker-Feldman*. *See, e.g., Sareen v.*
 12 *Sareen*, 356 Fed. Appx. 977, 978 (9th Cir. 2009) (*Rooker-Feldman* barred claims
 13 alleging constitutional violations in child custody proceedings as “forbidden de facto
 14 appeal” and claims were “inextricably intertwined” with state court's decision);
 15 *Operhall v. Az. Dep't of Econ. Sec.*, 324 Fed. Appx. 617, 618 (9th Cir. 2009)
 16 (affirming dismissal under the *Rooker-Feldman* of civil rights action seeking relief
 17 from state court decisions in juvenile dependency proceedings); *Grimes v. Alameda*
 18 *Co. Social Servs.*, 2011 WL 4948879, at *2 (N.D. Cal. Oct. 18, 2011) (*Rooker-*
 19 *Feldman* applies to challenges to parental rights and “related decisions by the state
 20 court,” including decisions regarding removal of the children from the home,
 21 visitation, and reunification services); *Sample v. Monterey Co. Family & Children*
 22 *Servs.*, 2009 WL 2485748, at *3 (N.D. Cal. Aug. 7, 2009) (no jurisdiction under
 23 *Rooker-Feldman* doctrine because the “core” of plaintiff's claims against was her
 24 unhappiness with the state court's child-removal and custody decisions). *Leubner v.*
 25 *County of San Joaquin*, No. 2:08-CV-0853, 2012 WL 2995671, at *15 (E.D. Cal. July
 26 23, 2012) (magistrate's report declining to hear parent's § 1983 constitutional claims
 27 relating to juvenile dependency court's visitation and child custody orders due to
 28 *Rooker-Feldman*).

B. Plaintiff Fails To State A Claim Against Nieman.

"Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a Rule 12(b)(6) dismissal for failure to state a claim upon which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (stating that a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation."), *cert. denied*, -- U.S. --, 132 S. Ct. 2101, 2012 WL 1468577 (Apr. 20, 2012).)

Plaintiff's Complaint appears to only bring one count against Nieman, for violation of constitutional rights under 42 U.S.C. § 1983. However, even if Plaintiff intended to include Nieman as a defendant in the counts for intentional and/or negligent infliction of emotional distress; and violations of state civil rights, none of those claims are plausible against Nieman. Nieman should therefore be dismissed.

1. Plaintiff Fails To Allege Any Facts Relating to Nieman.

Plaintiff sued fifty-six (56) named defendants. Despite a fifty-one (51) page Complaint, Defendant only names Nieman only once: Paragraph 59, which merely identifies Nieman as a defendant. In the factual allegations, no specific act or omission is attributed to Nieman. (Compl. ¶¶ 71-121.) Nor is Nieman attributed any specific act or omission within the claims sections of the Complaint. (Compl. ¶¶ 122-170.) Without any factual allegation regarding what Nieman is alleged to have done,

1 Plaintiff has wholly failed to plead any plausible claim against Defendant. Dismissal
 2 under *Iqbal* and *Twombly* is required.

3 Should the Court permit Plaintiff to re-plead his putative claims, the number
 4 and diversity of defendants should require Plaintiff to distinguish between each
 5 individual's or similar group's putative actions or omissions. Defendant has sued
 6 county social workers and various county employees, various public and private
 7 attorneys, employees of private, nonprofit foster family agencies or battered women's
 8 shelters, and his spouse, Tania Kasdan. And the relevant time period of the Complaint
 9 spans more than two years. If Plaintiff is permitted to amend, the Court should advise
 10 and require Plaintiff to identify the individual actions of the various defendants and
 11 the specific time period of their involvement. Doing so is essential not only to
 12 requiring Plaintiff to state a plausible claim, but also to provide the defendants with
 13 fair notice of the conduct with which they are charged.

14 **2. Plaintiff Cannot Allege A § 1983 Claim Against Nieman.**

15 The Complaint purports to assert a § 1983 civil rights claim against all
 16 defendants, presumably including Nieman. (Compl. at p. 36.) As to Nieman,
 17 however, the § 1983 claim fails because she is a private actor (not a state actor) and
 18 Plaintiff alleges no facts to convert her actions into state action.

19 To state a §1983 claim, a plaintiff must allege facts demonstrating that he was
 20 "deprived of a right secured by the Constitution or laws of the United States, and that
 21 the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins.*
 22 *Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999).

23 Section 1983 only redresses state action, not private conduct. "[T]he under-
 24 color-of-state-law element of § 1983 excludes from its reach 'merely private conduct,
 25 no matter how discriminatory or wrongful.'" *Id.* (quoting *Blum v. Yaretsky*, 457 U.S.
 26 991, 1002 (1982)). The presumption is that private conduct does not constitute state
 27 action, and the burden rests with a § 1983 claimant to demonstrate otherwise. *Florer*
 28 *v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011).

1 Here, Plaintiff has failed to allege facts sufficient to demonstrate that Nieman's
2 private conduct was tantamount to state action. The only allegations regarding
3 Nieman demonstrate that she was a private party since Plaintiff alleges she was an
4 employee of Children's Bureau, which is a private, non-profit entity. (Compl. ¶¶ 58,
5 59.) Because Plaintiff makes no other factual allegation regarding Nieman, he fails to
6 plausibly allege state action—a required element for his §1983 claim.

7 Plaintiff does, however, make two general allegations that he may attempt to
8 rely on: that Children's Bureau was a Los Angeles County contractor (Compl. ¶¶ 58,
9 59), and repeated allegations of all defendants' participation in a conspiracy (Compl.
10 ¶¶ 67-68; *passim*). These generalized statements are still insufficient to establish state
11 action.

12 First, regardless of whether Children's Bureau generally contracts with Los
13 Angeles County, Plaintiff makes no specific allegations regarding Nieman's individual
14 actions. To appropriately assert a claim against these Defendants, Plaintiff must show
15 that *her* individual action constituted state action causing an unconstitutional
16 deprivation of Plaintiff's rights. *See, e.g., Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
17 1989) ("Liability under section 1983 arises only upon a showing of personal
18 participation by the defendant."); *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988)
19 ("A person deprives another of a constitutional right, within the meaning of section
20 1983, if he does an affirmative act, participates in another's affirmative acts, or omits
21 to perform an act which he is legally required to do that causes the deprivation of
22 which the plaintiff complaint."). General factual allegations that a non-party employer
23 sometimes contracts with a county does not suffice.

24 Second, while participation in a conspiracy may sometimes permit a § 1983
25 claim, the general and conclusory allegations of a conspiracy proffered by Plaintiff are
26 insufficient because there are no facts alleged to support them. (Compl. ¶¶ 67-68
27 (attempting to allege conspiracy)). *See Simmons v. Sacramento Cnty. Superior Court*,
28 318 F.3d 1156, 1161 (9th Cir. 2003) (conclusory allegations of participation in

1 conspiracy are insufficient for a private party to be deemed a state actor); *Degrassi v.*
2 *City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (affirming 12(b)(6) dismissal of
3 § 1983 claim against private parties because "a bare allegation of such joint action [or
4 conspiracy] will not overcome a motion to dismiss; the plaintiff must allege 'facts
5 tending to show that [the private defendants] acted 'under color of state law or
6 authority.'" (citing *Sykes v. State of Cal.*, 497 F.2d 197, 202 (9th Cir. 1974)); *Price v.*
7 *State of Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991) (affirming 12(b)(6) dismissal of
8 § 1983 claim against private parties because "conclusory allegations, unsupported by
9 facts, will be rejected as insufficient to state a claim." (quoting in part *Jones v.*
10 *Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984)).)

11 To appropriately state a § 1983 conspiracy claim, Plaintiff must allege *facts*
12 permitting the inference of a plausible conspiracy. His mere conclusions that a
13 conspiracy existed are insufficient and warrant dismissal. *Burns v. County of King*,
14 883 F.2d 819, 821 (9th Cir. 1989) ("[T]o state a claim for conspiracy to violate one's
15 constitutional rights ..., the plaintiff must state specific facts to support the existence
16 of the claimed conspiracy."); *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992)
17 (claims based on vague and conclusory allegations, which fail to specify each
18 defendant's role in the alleged conspiracy, are insufficient and subject to dismissal).

19 Because Plaintiff has not pled facts showing that Nieman was a state actor, and
20 because Plaintiff has alleged no other plausible basis with which to convert private
21 conduct into state action, Plaintiff fails to state a plausible § 1983 claim against
22 Nieman.

3. Plaintiff Fails To State An IIED or NIED Claim Against Nieman.

a. Plaintiff's Third Count for Intentional Infliction of Emotional Distress and Fourth Count for Negligent Infliction of Emotional Distress Fail Because They Lack Facts to State a Claim.

To sufficiently support a claim of intentional infliction of emotional distress (IIED) Plaintiff pleading must show the following elements: "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001, 25 Cal. Rptr. 2d 550, 574 (1993). Conduct is "outrageous" if it is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Id.*

First, Plaintiff fails to plead any conduct (let alone outrageous conduct) undertaken by Nieman. (Compl. ¶¶ 134-141.) His IIED claim therefore lacks factual plausibility. Second, assuming the challenged conduct is the removal of the children from Plaintiff's custody and the prosecution of a dependency proceeding (which Nieman was not even involved with), as a matter of law such conduct cannot be outrageous because the protection of children amidst allegations of child abuse is a paramount public concern. As one court has described dependency proceedings:

Dependency proceedings are conducted to protect the safety and well-being of an abused or neglected child whose parents or guardians cannot or will not do so or who themselves pose a threat to the child. They commence with an initial hearing, which is held to determine whether a child falls within one of ten

jurisdictional bases of the juvenile court. Dependency courts ultimately conduct an evidentiary hearing regarding the proper disposition of the child. . . . After a child is placed under court supervision, subsequent court proceedings and reviews are required every six months.

E.T. v. George, 681 F. Supp. 2d 1151, 1155-56 (E.D. Cal. 2010) (internal citations omitted). As a matter of law, commencement and prosecution of a dependency proceeding which are designed for the protection of children (especially amidst allegations, true or not, of child abuse), cannot constitute the basis of an IIED claim because the conduct can never reasonably be considered outrageous and intolerable. Accordingly, Plaintiff fails to state a plausible IIED claim.

b. Plaintiff's Negligent Infliction of Emotional Distress Claim Also Fails Because Plaintiff Has Not Pled Any Breach of Duty by Nieman.

A claim for negligent infliction of emotional distress ("NIED") "contains the traditional elements of duty, breach, causation, and damages." *Jacoves v. United Merch. Corp.*, 9 Cal. App. 4th 88, 106 (1992). "NIED claims are merely a species of negligence, and thus, a plaintiff asserting an NIED claim must show that the defendant owed the plaintiff a duty of care." *Schwartz v. Lassen Cnty*, 838 F.Supp.2d 1045, 1061 (E.D. Cal. 2012) (citing *Lawson v. Mgmt. Activities*, 69 Cal.App.4th 652, 656 (1999)). "That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 985, 25 Cal. Rptr. 2d 550, 574 (1993) "[A]bsent a duty, the defendant's care, or lack of care, is irrelevant." *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal.App.4th 472, 481 (1996).

Here, Plaintiff fails to pled facts sufficient to support the necessary existence of a legal duty owed to him by Nieman. (Compl. ¶¶ 143-148.) While Plaintiff identifies various conduct (undertaken by unspecified defendants), Plaintiff does not identify a

1 legal duty imposed by law, does not plead facts showing that Defendant voluntarily
 2 assumed a legal duty toward Plaintiff, and does not plead facts showing that
 3 Defendant had a special relationship (or any relationship) to Plaintiff. (*Id.*)
 4 Accordingly, because Plaintiff has failed to identify any legal duty owed to him by
 5 Nieman, he has failed to state a plausible claim for NIED against her.

6 **4. Plaintiff's Fifth Count for Violation of Civil Rights Does Not**
 7 **State a Plausible Claim Against Nieman.**

8 Finally, Plaintiff appears to assert an omnibus claim for "violation of state civil
 9 rights." (Compl. at p. 44.) Within this claim, Plaintiff identifies his putative civil
 10 rights as arising from "the United States Constitution and other federal laws, the
 11 Constitution and laws of the State of California, and their rights under California
 12 Government Code Section 820.21 and California Civil Codes Sections 43, 49, 51, 52
 13 (The Unruh Civil Rights Act) and 52.1." (Compl. at ¶ 151.) Plaintiff fails to state a
 14 claim here because he fails to specify the particular civil right he relies on in relation
 15 to the putative conduct he alleges violates that right. For example, which of the
 16 numerous "other federal laws" or "laws of the State of California" did Defendant
 17 violate and how? The generality with which the complaint is pled fails to plead a
 18 concise statement demonstrating entitlement to relief.

19 Moreover, even the specific statutory sections identified by Plaintiff need be
 20 dismissed for failure to state a claim. For example, Plaintiff pleads Civil Code § 51,
 21 which prohibits discrimination by "all business establishments of every kind" on the
 22 basis of "sex, race, color, religion, ancestry, national origin, disability, medical
 23 condition, genetic information, marital status, or sexual orientation." Cal. Civ. Code §
 24 51(b). Yet Plaintiff fails to allege any facts showing that Nieman operated a
 25 "business establishment" as required by the act, and further fails to allege on which of
 26 the protected characteristics did Defendant allegedly discriminate against Plaintiff.

27 Additionally, as with all of his claims, Plaintiff fails to make any factual
 28 allegations regarding Nieman—as opposed to all 56 defendants *en masse*. Plaintiff's

1 state civil rights complaint therefore lacks factual plausibility as to this Defendant, and
2 must be dismissed.

3 **IV. CONCLUSION**

4 In light of the foregoing, Defendant Lou Nieman (erroneously sued as Lou
5 Graham) respectfully requests that the Court grant this Motion to Dismiss (a) first on
6 the basis of lack of subject-matter jurisdiction; and (b) second and alternatively on the
7 basis of Plaintiff's failure to state a claim upon which relief can be granted. Defendant
8 requests such other and/or additional relief to which she may be justly entitled.

9 Dated: October 12, 2012

Respectfully submitted,

10 LOCKE LORD LLP

11
12
13 By: /s/ Karen R. Palmersheim

14 Karen R. Palmersheim

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